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IN THE

Supreme Court of the United States

ILLINOIS TOOL WORKS INC. AND TRIDENT, INC.,
Petitioners,

v.

INDEPENDENT INK, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENT

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September 28, 2005

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QUESTION PRESENTED

Whether, in an action under Section 1 of the Sherman Act, 15 U.S.C. § 1, alleging that the defendant engaged in unlawful tying by conditioning a patent license on the licensee's purchase of a non-patented good, the plaintiff must prove as part of its affirmative case that the defendant possessed market power in the relevant market for the tying product, or whether market power instead is presumed based solely on the existence of a patent on the invention embodied in the tying product.

RULE 29.6 STATEMENT

Respondent Independent Ink, Inc. has no publicly traded stock, it has no parent company, and no publicly held company holds 10% or more of its stock.

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COUNTERSTATEMENT

The issue in this case is whether a seller of patented printheads may force customers to buy its ink rather than the ink of its competitors, which is of equal quality but offered at nearly one-third the price. Petitioners Illinois Tool Works Inc. and Trident, Inc. (collectively "Trident") seek to limit the ability of competitors like respondent Independent Ink, Inc., to challenge such arrangements as illegal tying under the antitrust laws. To be sure, patent law grants inventors some exclusive rights over their inventions in order to encourage innovation. And patent holders are allowed to charge monopoly prices for their inventions in order to recover their invention costs. But nothing in patent law permits a patent holder to extend the monopoly power conferred by a patent beyond the scope of that patent, for example, by using the patent to force customers to purchase a separate good. This case concerns the procedure for litigating antitrust claims against the use of patents to impose such anticompetitive tying arrangements.

This Court has long recognized a presumption that patented products used in such tying arrangements have market power, one element needed to prove a tying claim under the antitrust laws. This patent tying presumption has roots in Section 3 of the Clayton Act, 15 U.S.C. § 14, which was enacted in express response to a patent tying case. It also reflects decades of this Court's experience with patent tying arrangements. The presumption comports with the economic reality that, while many patents have little or no value, patents that are valuable frequently confer market power upon their holders, and it is these valuable patents that tend to be used in tying arrangements. The presumption also reflects the practical realities of patent tying litigation by providing a fair and efficient structure of proof.

Petitioners do not offer any persuasive reason for discarding this sensible presumption, which this Court has recognized and repeatedly reaffirmed for more than fifty years.

And this case would be a particularly inappropriate vehicle for overturning the presumption. As the factual record demonstrates, the presumption here was sensibly applied by the court of appeals. It allowed respondent Independent Ink, Inc., a long-time producer of high-quality specialty inks, to bring a strong patent tying claim without the debilitating and unnecessary expense that might have precluded the claim at the outset, while permitting Trident adequate opportunity to disprove alleged injury to competition upon remand.

A. The Dominant Market Position of Trident's Patented Printhead

This case concerns the tying of sales of Trident's piezoelectric ink jet printheads to the sale of replacement ink for those printheads for their entire working life. As Trident repeatedly acknowledged prior to the underlying litigation, it "dominates the inkjet printhead market" due to the patents it holds on on its printhead technology. J.A. 256a, 260a, 262a. Trident manufactures printheads that are sold to original equipment manufacturers (OEMs) who integrate them into computer-controlled ink jet printers. J.A. 74a. Trident has licensed its printhead technology to OEMs making well over 95% of high resolution ink jet systems for carton coding applications. J.A. 18a, 373a. Since this ink jet technology was introduced, demand for industrial ink jet printers has risen from $25 million in 1994 to over $140 million in 1999. J.A. 26a, 82a, 264a. Trident accounted for virtually all of those sales prior to 1999, and still captures 85% of sales. J.A. 20a, 333a, 348a, 373a.

Trident's printheads are primarily used in product manufacturing to print text, bar codes, and graphics directly onto blank cartons as those cartons move down an assembly or production line. J.A. 74a. The printheads are particularly well-suited to this function, and to bar coding in particular, because they combine the reliability and high resolution needed for such codes with the high speeds needed to inte-

grate printing into an assembly or production line. J.A. 77a-78a; *see also* J.A. 78a (discussing the demand for bar coding). Trident printheads are able to combine these different qualities by employing piezoelectric technology that uses electronic pulses to cause tiny changes in the shape of a ceramic crystal that can propel droplets of ink out of the printhead at rates as high as 10,000 droplets per second. J.A. 87a-88a. In addition, because the printhead operates digitally, it can be programmed to print individualized bar codes without slowing down the production line. J.A. 78a.

Alternative technologies such as preprinted boxes, labels, and other types of printers cannot offer the same functionality as Trident's piezoelectric printheads. J.A. 77a-78a. Although since the start of this lawsuit, two companies, Markem and Xaar, have introduced industrial ink jet printers, they employ different technologies than Trident's patented printhead and have significant drawbacks. J.A. 171a, 188a. Unsurprisingly, Markem and Xaar have been unable to undermine Trident's dominant position. Neither had any appreciable sales before 1999, and by 2001, the most recent year of sales information in the record, they accounted for less than 15% of the industrial ink jet sales. J.A. 20a, 333a, 373a.

Trident's dominance of the market for industrial carton coding is widely acknowledged. According to one industry analysis, "Trident is the only game in town" for industrial ink jet printers. J.A. 267a. The president of the largest printer OEM similarly recognized that Trident had "no real competition in the Hi-Resolution carton coding market." J.A. 375a. And Trident's customers confirmed—and bemoaned—Trident's market dominance. According to a survey conducted by Trident, its customers lamented that there were "no alternatives" to Trident's patented technology and that Trident had "no competition." J.A. 395a-96a, 398a. Indeed, the customers were "hoping for competition" so that they could use it "as a lever against Trident." J.A. 397a, 402a.

B. Trident's Attempts to Dominate Ink Sales

In a blatant end run around settled law prohibiting tying sales of a patented product to sales of a separate product, Trident forbid its OEM customers and the end users of its patented printhead technology from using replacement ink from third parties such as Independent Ink. Trident licenses OEMs to manufacture, use, and sell equipment that incorporates Trident printheads only "*when used in combination with ink and ink supply systems supplied by TRIDENT.*" J.A. 95a, 226a (emphasis added). Moreover, Trident's contracts with OEMs provide that the license to use Trident's patented technology "shall also extend to any customer of BUYER purchasing or otherwise acquiring the LICENSED PRODUCT from BUYER . . . ." J.A. 103a, 233a. Accordingly, prior to this suit, Trident contended that "[u]se of these third-party inks would be an unlicensed activity by the OEM and its end-user customer." J.A. 93a; *see also* J.A. 220a (asserting that Trident can sue for patent infringement if "a customer of a Trident customer uses non-Trident ink").[1]

Trident's customers and end users chafed under those restrictions. In its customer survey, nearly 60% of the responses complained about the restrictions on using ink from third parties such as Independent Ink, J.A. 394a, 399a, and about the "tremendous price" they were paying for Trident replacement ink, J.A. 447a; *accord* J.A. 391a, 394a, 409a. At least one customer was upset by Trident's failure to provide ink consumption rates, J.A. 396a, which prevents accurate estimates of the total cost of using a Trident printhead over its

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[1] Citing the trial court's opinion, Trident asserts that its licenses permit end users to purchase ink from third party manufacturers. Pet. Br. at 4 (citing Pet. App. 21a-22a). The trial court made no such finding. It simply noted Trident's *contention* that its licenses did not prevent end users from purchasing ink from third party manufacturers. Pet. App. 21a. Moreover, the court went on to observe that Trident's internal memoranda contradicted this contention. *Id.*

lifetime. Finally, Trident's customers and end users also said that they were "hoping for competition" and "looking forward to the possibility of competitive inks." J.A. 391a, 394a.

C. Independent Ink's Efforts to Compete for Ink Sales

Seeking to fill the demands of Trident's customers, Independent Ink, a long-time producer of high-quality specialty inks, developed inks for Trident's patented printheads, as did several other competitors. The ink used in Trident's printheads must be specifically designed to meet the operational requirements of these printheads, which ordinary inks cannot satisfy. J.A. 378a, 455a-56a. Independent Ink developed an ink that is chemically indistinguishable from the ink that Trident itself developed for use in these printhads. J.A. 519a-23a. Trident officials acknowledged internally that Independent Ink has a reputation for quality and ingenuity. J.A. 504a.

Independent Ink offered its replacement ink at prices from 60% to 70% less than Trident's ink prices. J.A. 117a (noting that Trident charged end users $325 a bottle for replacement ink, while Independent Ink charged only $125 to $189 per bottle). Other companies similarly offered replacement ink at a fraction of Trident's prices. J.A. 412a.

Trident reacted aggressively to this competition not by lowering its ink prices, but by trying to exclude its competitors from the ink market. It tried to convince OEMs and end users that use of inks from third parties would damage their machines. J.A. 442a. It falsely asserted that its competitors' inks would cause corrosion, clogging, and even fires. J.A. 461a. It even produced brochures, presentations, and a web page showing pictures of clogged and highly corroded printheads, implying that these problems were caused by its competitors' inks. J.A. 442a, 467a-68a. In fact, however, Trident did not know whether the damage in these pictures was caused by its own ink or that of its competitors, J.A. 480a-82a, and it conceded that it had no evidence that ink

from Independent Ink had ever caused any clogging or corrosion problems. J.A. 476a-78a.

Trident also bullied its licensees and their distributors into complying with the tying arrangement specified in its licenses. For example, it issued bulletins warning that "under no circumstances does anyone other than Trident have any license to supply you with ink for Trident products." J.A. 117a, 121a. It threatened to cut off the supply of printheads to OEMs who continued to sell or use competitors' inks, J.A. 273a, 420a, and it even threatened to sue its customers and end users if they dared to use competitors' ink. J.A. 20, 273a.

Finally, Trident took legal action. It sued Independent Ink and three other replacement ink suppliers for patent infringement in December 1997 in the Southern District of Illinois. Pet. Br. at 4. Because Independent Ink has no meaningful contacts in that district, it was dismissed from the suit for lack of personal jurisdiction. *Id.* at 3-4.

D. The Proceedings Below

This case was brought by Independent Ink in August 1998 in the Central District of California. Independent Ink sought a declaration that it did not infringe upon Trident's patents by selling ink to end users. Pet. App. 3a. Trident counterclaimed for patent infringement, and Independent Ink amended its complaint to allege that the restrictions upon purchasing ink imposed by Trident's patent licenses constituted an illegal tying arrangement. *Id.* Independent Ink also alleged monopolization and various state law claims. *Id.*

After Trident's infringement claims were dismissed with prejudice, Pet. App. 3a n.1, the trial court entertained summary judgment motions on the tying and monopolization claims. It denied Independent Ink's motion, but granted summary judgment for Trident on both of Independent Ink's antitrust claims. Pet. App. 56a. Focusing on market power to the exclusion of the other elements of Independent Ink's tying

claim, Pet. App. 29a & n.7, the court found that Independent Ink had failed to raise a genuine issue on this point because it did not offer a market share analysis examining the cross-elasticity of demand, the range of substitutes, or potential sources of supply. Pet. App. 38a-48a, 50a-53a. The trial court acknowledged in a footnote that decisions of this Court have recognized a presumption of market power in patent tying cases, but it dismissed these decisions as "vintage" cases inconsistent with the "real proof of market power" now required. Pet. App. 30a-38a & n.10. The parties then stipulated to dismissal of the remaining claims, and Independent appealed the antitrust rulings. *See* Pet. App. 57a.

The Federal Circuit affirmed the grant of summary judgment to Trident on Independent Ink's monopolization claim, but reinstated Independent Ink's tying claims. The court noted the "long history of Supreme Court consideration of the legality of tying arrangements." Pet. App. 5a. It observed that the Court had found a patent tying arrangement unreasonable in *International Salt Co. v. United States*, 332 U.S. 392 (1947), without making an inquiry into market power, and that a subsequent decision, *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), recognized that *International Salt* implicitly held "that, where the tying product is patented or copyrighted, market power may be presumed." Pet. App. 8a. The court of appeals also observed that subsequent decisions of this Court have "consistently reaffirmed the holdings of *International Salt* and *Loew's* that no proof of market power is necessary in patent or copyright tying cases," Pet. App. 9a, and rejected Trident's suggestion that these cases had been overruled by intervening decisions. Pet. App. 11a-14a.

The court of appeals also held that the presumption of market power is rebuttable, but that Trident had failed to rebut the presumption in opposing Independent Ink's summary judgment motion. Trident presented evidence that some package manufacturers were using preprinted labels rather

than coding cartons directly with ink jet printheads. Pet. App. 14a-15a. The court, however, held that the mere existence of an alleged substitute is not enough to rebut the presumption of market power; instead, an antitrust defendant must present some credible evidence of cross-elasticity of demand, the area of effective competition, or lack of market power. Pet. App. 16a-17a. The court of appeals reversed the grant of summary judgment to Trident on Independent Ink's tying claim, but declined to grant partial summary judgment to Independent Ink on the element of market power. Instead, it remanded to give Trident an opportunity to supplement the record to show that it lacked market power in the relevant market for ink jet printheads. Pet. App. 17a.[2]

SUMMARY OF ARGUMENT

Petitioners would have this Court overturn a presumption of market power in patent tying cases that it has recognized and repeatedly reaffirmed for over fifty years. As petitioners and the Government portray the presumption, it is a sweeping rule that supposedly invalidates *per se* many procompetitive tying practices without justification because "a large percentage of patents produce little or no economic value." Pet. Br. at 25. Petitioners paint a benign picture of tying arrangements and a dire picture of the market power presumption, suggesting that the presumption somehow encourages everything from meritless patent tying litigation to the death of innovation itself. *See* Pet. Br. at 27-34.

These dire predictions are baseless. This Court has presumed that the use of a patent to compel the purchase of a separate product confers market power since at least its 1947

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[2] Independent Ink filed a cross-petition for a writ of certiorari presenting the question whether the presumption of market power is irrebuttable. Because that cross-petition is still pending as of the date of this brief, Independent Ink confines the brief to the question whether the court of appeals correctly held that there is a rebuttable patent tying presumption.

decision in *International Salt Co. v. United States*, 332 U.S. 392 (1947). In the decades since, there has been no evidence of the harms petitioners warn of. This is unsurprising, for the market power presumption is far narrower than petitioners assert. It does not automatically invalidate patent ties, but merely provides a fair and efficient way of structuring proof of a single element in a prima facie case of illegal patent tying.

This presumption rests on a solid legal and economic basis. Petitioners spend much energy arguing that patents in general are unlikely to confer market power, Pet. Br. at 23-27, but ignore the key question whether patents *used to impose challenged tying arrangements* are likely to confer market power. In fact, those patents that are actually used in tying arrangements and are actually targeted by antitrust claims are likely to be highly valuable patents, and highly valuable patents are likely to confer market power. Only a highly valuable patent can be used to force customers to buy a distinct product that they otherwise would not purchase, especially at a price they do not want to pay. Thus, despite petitioners' and the Government's suggestions, economic reality favors maintaining the presumption.

The patent tying presumption also effectively addresses the practical realities of patent litigation. It permits consumers and small businesses with limited resources to bring meritorious tying claims without incurring the prohibitive cost of unnecessary and often extremely burdensome market share analysis that is, in any event, more efficiently addressed by defendants in the first instance. At the same time, because the patent tying presumption affects only the market power element of a tying claim, plaintiffs still bear the burden of proving the other elements of a tying claim, and defendants retain their affirmative defenses. These other elements and defenses will screen out liability for any ties that are genuinely procompetitive. In addition, the presumption's ease of

administration enables patent tying claims to be litigated more efficiently.

The facts of this case illustrate the sensible way in which the patent tying presumption allows plaintiffs to police anti-competitive patent tying arrangements. Trident, a conglomerate with sales of $11 billion a year that is the dominant producer of a patented print technology for industrial ink jet printers, conditioned licenses to use its patented printheads upon the purchase of replacement ink solely from Trident and not any of its competitors. Respondent Independent Ink, a specialty-ink manufacturer with about $5 million in annual sales that is known for innovation and high quality, sought to sell replacement ink of equal quality at a fraction of Trident's price. Trident responded by bullying its customers into not buying ink from Independent Ink, and then sued Independent Ink for patent infringement before these antitrust claims were filed.

The patent tying presumption made it possible for a small business such as Independent Ink to challenge Trident's blatant tying arrangement without incurring the prohibitive expense of hiring experts to engage in unnecessary market share analysis. Trident declined to offer any such evidence of its own, even though it has far readier access to information on its own market share and rival industrial ink jet printers than Independent Ink does. (The court of appeals, however, interpreting the market power presumption to be rebuttable, left it open to Trident to make such a showing on remand.) Trident has offered no persuasive reason why fifty years of settled law should be overturned to relieve it of this limited and entirely sensible burden.

The patent tying presumption should once again be reaffirmed. Moreover, even if this Court should decide to overturn or modify the presumption, it should affirm the court of appeals on the alternative ground that the record contains direct evidence of market power sufficient to defeat Trident's summary judgment motion. Market power in the tying con-

text means the power to "force a purchaser to do something he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 13-14 (1984). As Trident's own customer survey in the record shows beyond dispute, for years Trident forced its consumers to accept an unwanted condition and pay nearly three times the cost of Independent Ink's products for Trident's chemically indistinguishable ink, despite widespread and persistent customer dissatisfaction. Such direct evidence confirms that the patent requirements tie in this case was an exercise of Trident's market power.

ARGUMENT

In asking this Court to reject the presumption that patents used to impose tying arrangements confer market power, Trident is seeking to overturn a rule that the Court has recognized and repeatedly reaffirmed for more than fifty years. This Court wisely approaches such requests "with the utmost caution." *State Oil Co. v. Khan*, 522 U.S. 3 (1997).

The doctrine of *stare decisis* recognizes that adherence to precedent serves important purposes: it promotes stability by allowing individuals and businesses to rely upon legal decisions in ordering their affairs, *see, e.g.*, *Square D. Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 423 (1986); it encourages public confidence in and respect for the law, *see, e.g.*, *Smith v. Allwright*, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting); and it improves judicial decision-making by recognizing that longstanding decisions reflect the "wisdom of this Court as an institution transcending the moment." *Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 479 (1987) (quotation omitted).

To overcome the force of *stare decisis*, Trident must shoulder the heavy burden of showing that the existing rule has defied "practical workability," that there has been a change in law rendering the old rule obsolete, or that facts have changed

so much as to have "robbed the old rule of significant application or justification." *Planned Parenthood v. Casey*, 505 U.S. 833, 854-55 (1992). As explained below in Parts I-III, Trident has failed to meet that burden, offering no showing that the presumption is unworkable, nor pointing to changes in law or fact sufficient to justify abandoning decades of precedent.

Trident asserts that *stare decisis* has little force in antitrust law because Congress intended antitrust law to develop through common law reasoning. Pet. Br. at 14-15 (citing *State Oil*, 522 U.S. at 3). This assertion ignores the *statutory* origins of the prohibition on patent tying arrangements, which demonstrate that Congress did not intend *tying* doctrine to develop through common law reasoning alone. *Cf. Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989) (noting that *stare decisis* applies with special force to statutory interpretation).

In 1914, partly in response to a decision by this Court enforcing a patent tying arrangement, Congress enacted Section 3 of the Clayton Act.[3] Section 3 makes it unlawful "to lease or make a sale or contract for sale of goods, . . . whether patented or unpatented" on the condition that the purchaser shall not use the goods of a competitor where the condition may substantially lessen competition or tend to create a monopoly. 15 U.S.C. § 14. This provision of the Clayton Act was intended to "strengthen the Sherman Antitrust Act."[4]

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[3] *See* 3 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 2129-30 (Earl W. Kintner ed., 1978) [hereinafter LEGISLATIVE HISTORY] (statement of Sen. Walsh) (introducing legislation in order to prevent the imposition of tying arrangements like the one upheld in *Henry v. A.B. Dick Co.*, 224 U.S. 1, 35 (1912) (involving a license on a patented mimeograph machine for use only with paper, ink and other supplies sold by the patent holder)).

[4] LEGISLATIVE HISTORY, *supra*, at 1997 (statement of Sen. Reed); *see id.* at 1991-94 (statement of Sen. Reed) (noting that, while using a patent

Together, the Clayton Act and the Sherman Act weave a statutory web of protection against anticompetitive behavior, *see, e.g.*, *id.* § 12(a) (defining the "Antitrust laws," as modified by the Clayton Act, to include the Sherman Act); *id.* § 15 (providing, under the Clayton Act, private standing to enforce the Sherman Act and recover damages), and this Court has held that in tying cases arising under the Sherman Act, the congressional findings made in the Clayton Act "must be respected." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 11 (1984). *See also* 1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 179 n.997 (5th ed. 2002) (noting that courts apply essentially identical standards in tying cases under the Sherman and Clayton Acts).

In any event, even in ordinary antitrust cases, a persuasive justification is required to overrule precedent. *See, e.g.*, *Square D. Co.*, 476 U.S. at 423; *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *Flood v. Kuhn*, 407 U.S. 258, 282-85 (1972). Trident has offered no such justification.

I. PETITIONERS SEEK TO OVERTURN FIFTY YEARS OF SETTLED LAW PRESUMING THAT PATENTS HAVE MARKET POWER WHEN USED TO REQUIRE THE PURCHASE OF SEPARATE GOODS

Trident asserts that the market power presumption in patent tying cases "rests on an extraordinarily weak foundation." Pet. Br. at 10. Some of Trident's *amici* go even further, questioning whether this Court has ever recognized a presumption

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to impose a tying arrangement "will at first strike us as being plainly in violation of the Sherman Antitrust Act," the Court had held that "'Congress alone has the power to determine what restraints [on patent holders] shall be imposed,'" and therefore if patent tying arrangements are not prohibited by "legislative act[,] the evil will go unchecked") (quoting *A.B. Dick*, 224 U.S. at 35).

of market power in patent tying cases at all. *See, e.g.*, Gov't Br. at 18-24.

These contentions are without merit. As the court of appeals found, this Court has recognized a presumption of market power where a patent is used to require purchase of a separate good since at least its 1947 decision in *International Salt Co. v. United States*, 332 U.S. 392 (1947), and the Court has explicitly and repeatedly reaffirmed this presumption. Contrary to petitioners' contention that this Court's settled law rests on "scant analysis," Pet. Br. at 15, this Court in fact has based the presumption on decades of precise experience with patent cases that, like this one, involve requirements ties—tying arrangements "where customers who purchase one product from a firm are required to make all their purchases of another product from that firm." Dennis W. Carlton & Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION 321 (4th ed. 2005); *see also* Nalebuff *et al.* Br. at 5-6 (providing more precise definition).

In *International Salt*, the Court considered an antitrust challenge to a requirements tie. The defendant in that case held patents for salt processing machines, and it conditioned the lease of these machines upon the purchase of the salt needed to operate them. *See Int'l Salt*, 332 U.S. at 394. After the defendant admitted to this tying arrangement in its answer, the Government moved for and obtained summary judgment. Although the defendant claimed that there were competing salt machines, it did not present any evidence of such competition. *See id.* (noting that neither party submitted affidavits). Instead, the defendant argued that the Government had failed to present sufficient evidence that the defendant dominated the salt industry to warrant summary judgment. *See* Br. of Appellant at 30-31, *Int'l Salt v. United States*, No. 46 (U.S. Sept. 24, 1947) (citing *F.T.C. v. Sinclair Ref. Co.*, 261 U.S. 463 (1923)); *see also Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 304 (1949) (noting that

Sinclair Refining recognizes the importance of "a showing that the supplier dominated the market"). Implicitly presuming that there was market power, this Court disagreed and upheld the grant of summary judgment. *Int'l Salt*, 332 U.S. at 396.

Since 1949, the Court has explicitly recognized this patent tying presumption. *See Standard Oil*, 337 U.S. at 303-07. Less than two years after *International Salt*, in considering whether the presumption recognized in that case applies to requirements contracts, the Court observed that "[a] patent, . . . although in fact there may be many competing substitutes for the patented article, is at least prima facie evidence of [market] control." *Id.* at 307. The Court repeated this observation in cases over the next decade. *See N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 18 (1958) (Harlan, J., dissenting) (noting that *International Salt* "simply treated a patent as the equivalent of proof of market control"); *Times-Picayune Publ'g Co. v. United States*, 345 U.S. 594, 608 (1953) ("Patents, on their face, conferred monopolistic . . . market control."). Then, in 1962, in *United States v. Loew's, Inc.*, 371 U.S. 38 (1962), this Court endorsed (and expanded) the patent tying presumption. Citing *International Salt*, the Court held that in tying cases "[t]he requisite economic power is presumed when the tying product is patented . . . ." *Id.* at 45-46.

Since *Loew's*, the Court has repeatedly recognized and reaffirmed the presumption that patents used to impose a tie confer market power. *See, e.g., Jefferson Parish*, 466 U.S. at 16 (noting that it is "fair to presume" that a seller imposing a patent tying arrangement has market power); *U.S. Steel Corp. v. Fortner Enters., Inc.*, 429 U.S. 610, 619 (1977) ("*Fortner II*") (noting that the "statutory grant of a patent monopoly . . . give[s] rise to a presumption of economic power"); *Fortner Enters. v. U.S. Steel Corp.*, 394 U.S. 495, 503 (1969) (quoting *Loew's* for the proposition that the necessary showing of market power "may be inferred from the tying product's de-

sirability to consumers or from uniqueness in its attributes"). Indeed, it was not until 1984 that the patent tying presumption was ever questioned in this Court, *see Jefferson Parish*, 466 U.S. at 37 n.7 (O'Connor, J., concurring), and even then, a majority of this Court expressly endorsed and reiterated the presumption: "if the government has granted the seller a patent or similar monopoly over a product," the majority reasoned, "it is fair to presume that the inability to buy the product elsewhere gives the seller market power." *Id.* at 16.

When the Court adopted this presumption in *International Salt*, it already had the benefit of decades of experience with patent tying cases and with requirements ties in particular. In fact, the Court considered a requirements tie remarkably similar to the one at issue here as long ago as 1912, in the very decision overridden by the Clayton Act. In *Henry v. A.B. Dick Co.*, the plaintiff licensed its patented mimeograph machine for use "only with the stencil paper, ink and other supplies" made by the plaintiff. 224 U.S. 1, 11 (1912). When the defendant sought to sell ink for use with the mimeograph machine, the plaintiff sued for contributory infringement, and a 4-3 majority of the Court voted to allow the suit over the objection that this tying arrangement violated antitrust policies. *See id.* at 29-36.

As noted above, Congress responded to this decision by enacting the prohibition on patent tying arrangements in Section 3 of the Clayton Act. In considering the Act, Senators repeatedly referred to the *A.B. Dick* decision and another pending patent tying case.[5] Even more important,

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[5] *See, e.g.*, LEGISLATIVE HISTORY, *supra*, at 1993 (statement of Sen. Reed) ("one can hardly imagine a better illustration" than the *A.B. Dick* case "of the length to which these license agreements can be carried if the law remains unchanged"); *id.* at 1993-97 (statement of Sen. Reed) (reading into the record substantial portions of the *A.B. Dick* majority and dissenting opinions); *id.* at 2004 (statement of Sen. Reed) (noting that then-pending *United Shoe Machinery Corp. v. United States*, 258 U.S.

Congress amended the bill that became Section 3 to specifically prohibit patent tying arrangements.[6] Congress thus plainly intended Section 3 to overrule the *A.B. Dick* decision and to condemn arrangements in which sale of a patented product is conditioned on the sale of other separate goods. Victor H. Kramer, *The Supreme Court and Tying Arrangements: Antitrust as History*, 69 MINN. L. REV. 1013, 1023 (1985).

Following the passage of the Clayton Act, the Court faithfully applied this congressional policy to numerous cases concerning patent tying arrangements, including many requirements ties. In 1917, in *Motion Picture Patents Co. v. Universal Film Management Co.*, 243 U.S. 502 (1917), the Court considered whether a company could license a patented film projection machine on the condition that it be used solely with the company's films. Expressly overruling *A.B. Dick*, the Court refused to enforce this requirements tie in light of the "persuasive expression of public policy" in Section 3 of the Clayton Act. *Id.* at 516-18.

Over the next thirty years, the Court considered numerous other cases in which patents were used in requirements ties, holding them anticompetitive without further proof of market power. For example, in *International Business Machines Corp. v. United States*, 298 U.S. 131 (1936), IBM had invented and patented the only machines that could perform certain tabulations and computations. *Id.* at 133. IBM leased these machines on the condition that customers use them only

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451 (1922) (tying shoe manufacturing machines to supplies), is "probably one of the most exasperating illustrations of how these legal devices can be employed"); *id.* at 2129 (statement of Sen. Walsh) (noting the "significance" of the *A.B. Dick* case).

[6] *See, e.g.*, LEGISLATIVE HISTORY, *supra*, at 2129-30 (statement of Sen. Walsh) (introducing amendment to prohibit the practice of selling or leasing "patented articles coupled with the condition that the purchaser or lessee must buy a lot of other unpatented articles").

with IBM's tabulating cards. *Id.* at 134. The Court held that the tie violated the Clayton Act, which it expressly found prohibits tying arrangements. *Id.* at 137. The *IBM* decision drew support for its antitrust ruling from a patent misuse tying case, *Carbice Corp. v. American Patents Development Corp.*, 283 U.S. 27 (1931), which refused to consider a patent infringement claim because the patent in question had been used to impose a requirements tie. *Id.* at 30, 33-34. In *Carbice*, the Court reasoned that this tying arrangement was analogous to practices "condemned under the Sherman Anti-Trust Law." *Id.* at 34.

In half a dozen other cases, the Court similarly either invalidated a requirements tie under antitrust law or refused to enforce a patent used to impose such a tie—all without once requiring any additional affirmative evidence of market power.[7] Thus, by the time that this Court decided *International Salt,* it not only had the benefit of the congressional policy underlying the Clayton Act; it also had experience with nearly a dozen patent tying arrangements, each of which it had found to be anticompetitive.

In criticizing this Court's ruling in *International Salt*, Trident ignores the lengthy experience of both Congress and this Court with patent tying arrangements in general and with requirements ties in particular. Instead, it attacks both *Inter-*

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[7] *See Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661 (1944) (conditioning license for patented furnace combination upon purchase of switch); *Mercoid Corp. v. Minneapolis-Honeywell Regulator Co.*, 320 U.S. 680 (1944) (same); *Morton Salt Co. v. G.S. Suppiger Co.*, 314 U.S. 488 (1942) (conditioning lease of patented machine upon purchase of salt); *B.B. Chem. Co. v. Ellis*, 314 U.S. 495 (1942) (conditioning use of a patented method of shoe manufacturing upon use of unpatented supplies); *Leitch Mfg. Co. v. Barber Co.*, 302 U.S. 458 (1938) (conditioning use of patented road building method upon purchase of tar); *United Shoe*, 258 U.S. 451 (conditioning use of patented shoe manufacturing machines upon purchase of supplies).

national Salt and *Loew's* for relying upon cases applying the patent misuse doctrine rather than antitrust law. *See* Pet. Br. at 17-19. *International Salt*, however, did not ground its antitrust conclusion in patent misuse decisions; rather, it cited those cases for the innocuous proposition that the defendant's patents over the salt machines "afford no immunity from the anti-trust laws." *See* 332 U.S. at 395-96.

Petitioners have it backwards: the patent misuse decisions of this era were based upon the congressional policies underlying Section 3 of the Clayton Act, not the other way around. This Court explicitly recognized as much in the *Motion Picture Patents* case. *See* 243 U.S. at 517; *see also Mercoid*, 320 U.S. at 667; *Carbice*, 283 U.S. at 33-34. Thus, when this Court' patent tying cases looked to cases involving patent misuse defenses, they did so based upon underlying antitrust principles.

This Court explained the patent tying presumption in *Loew's*, albeit in abbreviated form. It observed that "one of the objectives of the patent laws is to reward uniqueness," and "the existence of a valid patent on a tying product" therefore shows "a distinctiveness sufficient to conclude that any tying arrangement involving the patented product would have anticompetitive consequences." 371 U.S. at 46. Trident quotes this explanation, *see* Pet. Br. at 18, but makes no attempt to refute it. Nor can it. As the next section demonstrates, *Loew's* rationale for presuming market power in patented products used in tying arrangements reflects both the objectives of patent law and the practical realities of patent tying litigation.

II. THIS NARROW PATENT TYING PRESUMPTION SHOULD BE PRESERVED BECAUSE IT STRUCTURES PROOF IN TYING CASES IN A FAIR AND EFFICIENT MANNER

Tying arrangements are said to be *per se* illegal, but in practice they are really subject to a "structured rule of reason" analysis. Lawrence A. Sullivan & Warren S. Grimes, THE LAW OF ANTITRUST: AN INTEGRATED HANDBOOK § 7.1, at 383 (2000). Plaintiffs bringing tying claims must establish at least four elements, of which market power is only one:

(1) two separate products or services are involved,

(2) the sale or agreement to sell one product or service is conditioned on the purchase of another,

(3) the seller has sufficient economic power in the market for this tying product to enable it to restrain trade in the market for the tied product, and

(4) a not insubstantial amount of interstate commerce in the tied product is affected.

ANTITRUST LAW DEVELOPMENTS 5TH, *supra*, at 179 n.997; *see also id.* at 175, 179 (noting additional requirements imposed by some courts).

Defendants in tying cases are also permitted to assert affirmative defenses based on efficiency and other business justifications. *See id.* at 207-08 (noting various successful defenses). *See also United States v. Microsoft Corp.*, 253 F.3d 34, 84-97 (D.C. Cir. 2001) (applying rule of reason analysis in tying case where possible procompetitive effects of tying arrangement are poorly understood). In addition, as in all antitrust cases, standing is limited to individuals who suffer injury resulting from harm to competition. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977).

Although the Court's earlier decisions may not have articulated the basis of the market power presumption in detail, the

presumption reflects a thorough understanding of patent tying litigation, and structures such litigation in a fair and efficient fashion. The presumption recognizes that the patents involved in tying litigation are likely to be unusually valuable and therefore to fall within the select group of patents that realize patent law's promise of market power. It reflects the practical realities of tying litigation and therefore avoids unnecessary market share analysis. It also ensures that the cost of market share analysis does not bar individuals and small businesses from pursuing meritorious tying claims and it imposes the burden of proof on the party best situated to address the effects of the patent. In sum, the patent tying presumption provides a sensible way to order the proof of market power in patent tying cases.

A. The Patent Tying Presumption Accurately Reflects Economic Reality Because Patents That Are Involved in Tying Litigation Are Likely to Confer Market Power

In *Loew's*, this Court explained why patents involved in tying arrangements are likely to confer market power. The "existence of a valid patent on a tying product," it observed, is sufficient to show "anticompetitive consequences"—and therefore market power, which is needed to cause such consequences (*see, e.g., Jefferson Parish*, 466 U.S. at 16-17; *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 795 (1st Cir. 1988))—because patent laws seek to "reward uniqueness." *Loew's*, 371 U.S. at 46. This explanation reflects the practical realities of patent tying litigation. Patents are intended to confer market power upon patent holders. Many patents have little or no value and are incapable of fulfilling this intention but other patents are highly valuable and thereby likely to convey market power. Because the patents involved in tying arrangements and in tying litigation are likely to be highly valuable, they are likely to confer market power.

1. Petitioners Improperly Focus on Patents in General, Not the Patents That Are Used to Impose Patent Tying Arrangements

Trident objects to the patent tying presumption on the ground that many patents have little or no value and that it is therefore irrational to presume that any given patent confers market power. Pet. Br. at 23-27. This objection misses the point. The patent tying presumption applies only in tying cases. Thus, the relevant pool is not all patents; it is only those patents used in tying arrangements and involved in tying litigation.

Nor is there any reason to believe that this Court assumed that most patents confer market power in *International Salt* and *Loew's*. By 1947, when *International Salt* was handed down, economists knew that technological innovations normally offer only "very modest compensation or nothing or less than nothing." Joseph A. Schumpeter, CAPITALISM, SOCIALISM, AND DEMOCRACY 74 (1942). Likewise, this Court was generally aware of these considerations at that time. In 1949, only two years after *International Salt*, the Court observed that a patent can be prima facie evidence of market control, even though "in fact there may be many competing substitutes for the patented article." *Standard Oil*, 337 U.S. at 307. Moreover, as Trident itself observes, *see* Pet. Br. at 23, in 1958, the Court observed that it was "common knowledge that a patent does not always confer a monopoly over a particular commodity," *Northern Pacific*, 356 U.S. at 10 n.8, and the economists of the time made clear that many patents are not even used. *See* Barkev S. Sanders *et al.*, *The Non-Use of Patented Inventions*, 2 PATENT, TRADEMARK & COPYRIGHT J. OF RES. & EDUC. 1, 7 (1958). Nonetheless, this Court affirmed the patent tying presumption when it decided *Loew's* four years later.

2. Patents That Are Used to Impose Tying Arrangements Are Likely to Be Highly Valuable and Therefore to Confer Market Power

Although it is true that "a large percentage of patents produce little or no economic value," Pet. Br. at 25, it is also indisputedly true that numerous patents are highly valuable and therefore grant market power. Patents used to impose tying arrangements are likely to be among those highly valuable patents.

Patent law holds out the promise of market power, by definition. It seeks to "stimulate the efforts of genius" by "holding out a reasonable reward to inventors, and giving them an exclusive right to their inventions for a limited period." *Pennock v. Dialogue*, 27 U.S. 1, 19 (1829) (Story, J.). Because inventors often incur "enormous costs in terms of time, research, and development" in creating their inventions, *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470, 480 (1974), the rewards conferred by patent law must promise to be quite valuable to provide inventors with incentives to incur these costs.

As economists recognize, to provide these incentives, patents must sometimes confer market power:

> The funds supporting invention and the commercial development of invention are front-end "sunk" investments; once they have been spent, they are an irretrievable bygone. To warrant making such investments, an individual inventor or corporation must expect that once commercialization occurs, product prices can be held above postinvention production and marketing costs long enough so that the discounted present value of the profits (or more accurately, quasi rents) will exceed the value of the front-end investments. *In other words, the inventor must expect some degree of protection from competition, or some monopoly power.* The patent

> holder's right to exclude imitating users is intended to create or strengthen that expectation.

F.M. Scherer & David Ross, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 622 (3d ed. 1990) (emphasis added).

Patents confer such market power by granting exclusive rights over the manufacturing, sale, and use of patented inventions, *see*, 35 U.S.C. §§ 154(a)(1), 271(a), and their substantial equivalents, *see, e.g.*, *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 732 (2002). Patents also confer market power over valuable products by barring the entry of competitors. *See* Herbert Hovenkamp, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 3.9d, at 143 (3d ed. 2005); *see also* Gov't Br. at 6, 26 (noting that "[t]he existence of a patent is relevant to the question of market power" because a patent may deter entry of competitors).

A small minority of patents realize this promise of market power and become highly valuable. *See, e.g.*, RICHARD T. RAPP & LAUREN J. STIROH, STANDARD SETTING AND MARKET POWER at 1, http://www.ftc.gov/os/comments/intelproperty comments/nera.pdf.[8] Indeed, the most extensive study of

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[8] *Accord* F.M. Scherer, *The Size Distribution of Profits from Innovation*, 49/50 ANNALES D'ECONOMIE ET DE STATISTIQUE 496 (1998) ("It is now widely recognized that the size distribution of profits from technological innovation is skewed to the 'right.'"); Mark Shankerman, *How Valuable is Patent Protection? Estimates by Technology Field*, 29 RAND J. ECON. 77, 79, 93 (1998) ("The distribution of the private value of patent rights is sharply skewed in all technology fields, with most of the value concentrated in a relatively small number of patents in the tail of the distribution."); Jean Olson Lanjouw, *Patent Protection in the Shadow of Infringement: Simulation Estimations of Patent Value*, 65 REV. OF ECON. STUD. 671, 695 (1998) ("All of the [patent value] distributions are very skewed—at most 16% of total value. . . accrues to the bottom 50% of patents."); Ariel Pakes, *Patents as Options: Some Estimates of the Value of Holding European Patent Stocks*, 54 ECONOMETRICA 755, 779 (1986)

patent value to date found that 70% of patents considered valuable enough to pay a modest renewal fee were worth more than $500,000, 50% more than $1 million, 30% more $5 million, and 15% more than $20 million.[9] In other words, patents are a sort of lottery: while the majority of patents confer only modest rewards, "the big prizes from innovation are thrown to a small minority of winners." F.M. Scherer, *The Innovation Lottery*, *in* EXPANDING THE BOUNDARIES OF INTELLECTUAL PROPERTY 15 (Rochelle Dreyfuss *et al.*, eds., 2001).[10]

The patents used to impose tying requirements are likely to be among the highly valuable patents that confer market power. When a buyer purchases a good that is patented or contains a patented component or process, it does not want its license to use the patent to be conditioned upon purchasing another good; it wants an unconditional license. As a consequence, buyers are unlikely to accept a license conditioned upon purchasing other goods unless there is something highly valuable about the patent being licensed. If the patent is not highly valuable, buyers will not feel compelled to accept a condition on the license; instead, they will turn elsewhere and buy a substitute for the patented good that is free from any such conditions. *Grappone*, 858 F.2d at 795;

(noting that evidence available from case studies indicates an "extremely skewed distribution of the values of patented ideas").

[9] Dietmar Harhoff *et al.*, *Exploring the Tail of Patented Invention Value Distributions* (discussing Table 12-5), *in* ECONOMICS, LAW, AND INTELLECTUAL PROPERTY: SEEKING STRATEGIES FOR RESEARCH AND TEACHING IN A DEVELOPING FIELD 297 (Ove Granstrand ed., 2003).

[10] Trident and the Government cite Professor Scherer, who is a former director of the Federal Trade Commission's Bureau of Economics as well as a distinguished scholar, in supposed support of their position. *See* Pet. Br. at 38 n.13; Gov't Br. at 12 n.7, 28-29 n.21. In fact, they have misunderstood Professor Scherer's research and his views—as Professor Scherer himself makes clear in his *amicus* brief.

see also Times-Picayune, 345 U.S. at 605 (noting that usually only parties with some market power are able to impose unwanted conditions upon consumers). In other words, sellers are only likely to be able to impose patent tying arrangements when their patents are highly valuable.

3. Requirements Ties, the Subject of the Patent Tying Presumption in This Case and This Court's Prior Cases, Generally Cannot Be Imposed Absent Market Power

Although some tying arrangements are procompetitive due, for example, to economies of scale that lower the overall cost of the combined goods and are therefore acceptable to consumers even in a competitive market, that is not typically the case with patent tying arrangements. As here, most patent tying arrangements are in the form of requirements ties in which a customer purchasing one product is required to make all purchases of supplies needed to use the first product from that product's manufacturer. Requirements ties are "perhaps the most common type of tie-in." Carlton & Perloff, *supra*, at 333; *accord* Barry Nalebuff, *Bundling, Tying and Portfolio Effects*, DEPARTMENT OF TRADE AND INDUSTRY ECONOMICS PAPER NO. 1, at 72 (2003). Moreover, nearly all the patent tying arrangements that have come before this Court have taken this form. *See supra* pp. 14-15 (describing *International Salt*); *id.* at p. 16 (*A.B. Dick*); *id.* at pp. 17-18 & n.7 (the *IBM* punchcard case, *Carbice*, and other patent misuse cases).[11]

Requirements ties offer buyers neither convenience nor cost savings. Unlike arrangements where goods are sold together at the same time, requirements ties do not take advantage of economies of scale or distribution that lead to

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[11] Two other cases in which tying arrangements were struck down, *Northern Pacific*, 356 U.S. at 1, and *Eastman Kodak Co. v. Image Technical Serv.*, 504 U.S. 451 (1992), involved deferred purchase requirements similar to requirements ties.

lower prices. Instead, as the American Bar Association recognizes, they are typically used for "metering," *see* ABA Br. at 10, which makes the price charged vary with usage. *See, e.g.*, Nalebuff, *Bundling, Tying, and Portfolio Effects*, *supra*, at 16. A requirements tie can be used to meter when the seller charges a supracompetitive price for the tied product (ink here), thereby effectively increasing the cost of the tying product the more it is used. *See id.* at 17. Unless the cost of the product varies directly with usage, metering results in different consumers being charged different prices for the same good, which is a form of price discrimination. *See id.* at 72; *see also* Hovenkamp, *supra*, § 3.9b, at 137 (noting that metering is a "very common price discrimination mechanism").

Price discrimination is strong evidence of market power. High-volume consumers would prefer not to pay more than other consumers, and in a competitive market, they will turn away from sellers engaged in price discrimination and patronize buyers offering them lower flat rates. Thus, as Trident's own authorities recognize, persistent price discrimination is "very good evidence" of market and, indeed, monopoly power. Richard A. Posner, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 63 (1976); *accord* Hovenkamp, *supra*, § 3.9b, at 136 (noting that sustained price discrimination is "pretty good" evidence of market power).

Even if consumers were amenable to paying more for a product the more they used it, they would still be unlikely to accept requirements ties in the absence of an exercise of market power. Especially in this digital age, there is no need to use the consumption of supplies to measure the usage of a product: usage can be measured directly through counting devices and the like. *See, e.g.*, Louis Kaplow, *Extension of Monopoly Power Through Leverage*, 85 COLUM. L. REV. 515, 541-42 (1985). Even worse, metering can be used to obscure the price of a tying product and lure even sophisticated

consumers into paying more for the product over its life than they would in a competitive setting. *See, e.g.*, Richard Craswell, *Tying Requirements in Competitive Markets: The Consumer Protection Issues*, 62 B.U. L. Rev. 661, 671-74 (1982). Indeed, given the ability to measure consumption directly, the desire to shroud prices and deceive consumers is usually the most plausible reason for a company to impose a requirements tie. *See* Nalebuff, *Bundling, Tying, and Portfolio Effects*, *supra*, at 82; *see also* J.A. 396a (noting Trident's refusal to provide consumers with information about ink consumption).

No doubt aware that the ability to engage in price discrimination demonstrates market power, Trident does not defend the requirement that its customers and end users buy its ink as a metering device. Instead, Trident claims the requirement is "protecting system performance" and "preserving the goodwill Trident has developed." Pet. Br. at 30 n.8. As the Court has recognized, such claims rarely prevail because in most situations "specification of the type and quality of the product to be used in connection with the tying device is protection enough." *Standard Oil*, 337 U.S. at 305-06. *See also* ANTITRUST LAW DEVELOPMENTS 5TH, *supra*, at 208 n.1187 (listing cases); Nalebuff, *Bundling, Tying, and Portfolio Effects*, *supra*, at 21 (noting that based on "safety and quality may be the last refuge of a scoundrel"). In any event, the use of requirements ties to ensure quality deprives consumers of choice. *See Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of the University of Oklahoma*, 468 U.S. 85, 107 (1984) ("Congress designed the Sherman Act as a consumer welfare prescription," and practices "reducing the importance of consumer preference" are inconsistent with this "fundamental goal.") Even where a seller has valid quality concerns, consumers want information about those concerns, not rigid restrictions on the source of their supplies. Consumers are likely to accept requirements ties only when forced by the seller's market power.

4. Patents Involved in Patent Tying Claims Are Likely to Be Highly Valuable

As in this case, patent tying claims are frequently raised in response to patent infringement claims. Patent infringement litigation tends to focus upon the most valuable patents. *See, e.g.*, Jean O. Lanjouw & Mark Shankerman, *Characteristics of Patent Litigation: A Window on Competition*, 32 RAND J. ECON. 129, 147 (2001) (finding a "quite high" likelihood of litigation for "high-value patents"). In fact, as the *amicus* brief of Professor F.M. Scherer details, the value of patents is directly correlated with litigation costs.

Professor Scherer and his colleagues studied a group of patents issued in Germany, which at the time required escalating renewal fees. Analyzing patents that were renewed and therefore presumably valuable, they found that the patents challenged in procedures prior to issuance were on average 11.2 times more valuable than other renewed patents, and that those challenged in more expensive proceedings after issuance were 42.6 times more valuable. *See* Harhoff *et al.*, *Citations, Family Size, Opposition and the Value of Patent Rights*, *supra*, at 1358-59. As the cost of German patent proceedings is a fraction of the cost of an antitrust proceeding in this nation, this research shows that patents involved in contested proceedings tend to be "among the few patents with truly significant value." Scherer Br. at 7; *see also* Sullivan & Grimes, *supra*, § 7.2.d.9, at 429 (2000) (noting that a patent may "suggest the presence of interbrand market power, particularly if the patent is sufficiently valuable to engender antitrust or patent infringement litigation").

Trident makes no attempt to show that patents of little or no value are likely to be the subject of patent tying claims. It merely asserts that "[n]othing about tying changes the degree of power that inheres in an intellectual property right." Pet. Br. at 24. Patents that are involved in tying litigation are, however, different from run-of-the-mill patents because they

are highly valuable. They are not patents for silly products such as motorized ice cream cones, *see* Houston IP Law Ass'n Br. at 10 n.16, or minor improvements on existing products such as soft drink cans, easy opening soft drink can, bottle openers, toothbrushes, and paper clips, Pet. Br. at 13; Gov't Br. at 21, the patents on which Trident and its *amici* focus. Such low-value patents are unlikely to be involved in either tying arrangements or tying litigation, and they therefore shed no light on the practical reality of patent tying litigation.

B. The Patent Tying Presumption Enables Plaintiffs to Vindicate the Public Interest in Competition in the Tied Product Market

The patent tying presumption helps to ensure that meritorious claims will be heard. In private enforcement cases, tying claims typically pit individuals or small businesses against a multinational corporation or other major business entity.[12] In this case respondent Independent Ink, a company with revenues of about $5 million a year, is pitted against a subsidiary of a company with revenues of $11 billion per year. *See Illinois Tool Works Company Profile*, http://biz.yahoo.com/ic/10/10778.html (last visited Sept. 27, 2005). In many such instances, small companies and individuals will be unable to afford the cost of the expert testimony needed to define markets and establish market power through market share analysis.

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[12] *See, e.g., Kodak*, 504 U.S. at 455 (independent service organizations suing Eastman Kodak Company); *Jefferson Parish*, 466 U.S. at 5 (individual anesthesiologist suing hospital); *Fortner II*, 429 U.S. at 613 (local real estate development company suing U.S. Steel Corporation). *See generally* Warren S. Grimes, *Antitrust and the Systematic Bias Against Small Business*, 52 CASE W. RES. L. REV. 231, 236-37 (2001); Steven C. Salop & Lawrence J. White, *Private Antitrust Litigation: An Introduction and Framework, in* PRIVATE ANTITRUST LITIGATION (Lawrence J. White ed., 1988).

By lifting from small business plaintiffs the burden of unnecessary market share analysis—while allowing larger companies to engage in such analysis if they so choose—the market power presumption ensures that valid claims of patent tying will not be dropped due to the cost of expert testimony. Defining market power and analyzing market shares—the ordinary method of proving market power—can be prohibitively expensive. *See, e.g.*, Philip Areeda, *The Changing Contours of the* Per Se *Rule*, 54 ANTITRUST L.J. 27, 28 (1985) ("proving markets and power is difficult, complex, expensive, and time-consuming"); Richard A. Given, ANTITRUST: AN ECONOMIC APPROACH § 3.01 at 3-12 (2005) (noting that even where market definition is fairly clear, proof of definition "may take years and cost hundreds of thousands if not millions of dollars").

In many cases the patent tying presumption will obviate any inquiry into market share altogether. Because the presumption accurately reflects the practical reality of patent tying litigation, defendants may have no credible basis for contesting market power (which might be why Trident decided not to conduct any market share analysis in this case). Thus, in many such cases, the possession of market power will not be contested, and the presumption will save parties and courts from having to entertain disputes over market share.

Even where market power is contested, the patent tying presumption might nonetheless limit litigation over market share analysis by focusing the parties on the applicability of the presumption. Patents confer market power when the exclusive rights they grant effectively prevent competitors from offering competing substitutes. If the defendant in a patent tying case can show the patent in question has expired or relates to a minor component of the good in question, it will be easy for courts to conclude that the patent does not preclude competing substitutes, and the presumption will be

rebutted. In this way as well, the patent tying presumption helps avoid unnecessary market share analysis.

C. The Patent Tying Presumption Does Not Impose an Unfair Burden on Patent Holders

The patent tying presumption is fair as well as efficient. It shifts the burden of producing evidence concerning market power onto the party best situated to determine whether the patent in question confers such power. The patent holder is in a far better position to understand how the patent used in the tying product operates than competitors such as Independent Ink, who sell only the tied product, as well as whether the patented product has any close substitutes. Thus, it is entirely fair to place the burden of rebutting the patent tying presumption on the patent holder.

Trident contends that the market power presumption imposes an onerous burden upon patent holders because "proving a negative is difficult." Pet. Br. at 32 n.10. That is not true. In tying cases, a patent holder can rebut a claim of market power by showing that the patented product has close, noninfringing substitutes. Thus, the presumption requires an affirmative, not a negative, showing in rebuttal.

It makes no difference that Trident failed to rebut the patent tying presumption in this case. Pet. App. 16a-17a. Trident argued that the presumption was rebutted by the mere existence of two companies, Xaar and Markem, that sell ink jet printheads. The court of appeals correctly rejected this argument. Markem and Xaar did not even begin operating until 1999, the year after this suit was filed. Even more important, the mere existence of an alleged substitute does not preclude the exercise of market power: the substitute must be close enough to constrain pricing behavior. *See* ANTITRUST LAW DEVELOPMENTS 5TH, *supra*, at 525; *see also Times-Picayune*, 345 U.S. at 612 n.31 ("For every product, substitutes exist."). That is obviously not the case here, as

Trident's continued dominance of the industrial carton coding market demonstrates. *See supra* p. 2 (noting that Trident charges as much as three times more for its ink than Independent Ink). In addition, Trident failed to submit any "credible economic evidence of the cross-elasticity of demand, the area of effective competition, or other evidence of lack of market power." Pet. App. 16a. Even more important, Xaar and Markem did not have any sales prior to the filing of this complaint and later accounted for no more than 15% of the sales of industrial ink jet printheads. *See* J.A. 20a, 333a, 373a. Thus, the evidence concerning the Xaar and Markem printheads proves the absence, not the presence, of effective substitutes for Trident's patented printheads.

D. The Patent Tying Presumption Enables the Efficient Administration of Antitrust Law by the Courts

The "administrative efficiency interests in antitrust regulation are unusually compelling," *F.T.C. v. Superior Court*, 493 U.S. 411, 430 (1990), and, accordingly, "[a]ntitrust law is filled with presumptions." 2 Phillip E. Areeda *et al.*, ANTITRUST LAW § 305f, at 55 (2d ed. 2002).[13] As this Court has observed, presumptions serve "to assist courts in managing circumstances in which direct proof, for one reason or another, is rendered difficult" in light of "considerations of

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[13] *See, e.g., Nat'l Collegiate Athletic Ass'n*, 468 U.S. at 109 ("when there is an agreement not to compete in terms of price or output, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement") (quotation omitted); *Cont'l T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977) (noting that *per se* rules "minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials"); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963) (presuming that a merger producing a firm with a large percentage of the relevant market must be enjoined absent "evidence clearly showing that the merger is not likely to have such anticompetitive effects").

fairness, public policy, and probability as well as judicial economy." *Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988).

While the patent tying presumption is not a full-blown *per se* rule, but rather one element of a structured rule of reason, *see supra* p. 20, it still fits comfortably within this paradigm. The presumption deals with market power, an issue that is often notoriously difficult and expensive to establish. *See, e.g., F.T.C. v. Superior Court*, 493 U.S. at 430 (noting the "enormous complexities" of defining markets and proving market power through market share analysis) (quotation omitted). The presumption provides a way to structure proof of market power that is fair to the parties because it allocates burdens to the parties best situated to bear them, and that furthers the goals of the antitrust laws by ensuring that the cost of litigating market power will not bar meritorious claims. It thus furthers judicial economy by streamlining the proof and hastening the joinder of issue on market power when market power is the dispositive question.

III. PETITIONER'S POLICY ARGUMENTS TO THIS COURT IN FAVOR OF ELIMINATING THE PATENT TYING PRESUMPTION ARE BETTER DIRECTED TO CONGRESS AND ARE BASELESS IN ANY EVENT

Trident urges this Court to overrule the patent tying presumption because it is an irrational rule that is based upon a rudimentary misunderstanding of the economics of patents. Such arguments seek to overturn a century of statutory policy and thus are better directed to Congress. Congress has had ample opportunity to eliminate the market power presumption, but has repeatedly declined to do so.

For example, Congress considered proposals to eliminate the patent tying presumption from antitrust law when it enacted the Patent Misuse Reform Act of 1988, but the final legislation omitted any such proposal. The Senate bill contained a provi-

sion eliminating the presumption, *see* S. 438 (proposing the "Intellectual Property Antitrust Protection Act of 1988" to provide that an intellectual property right "shall not be presumed to define a market or to establish market power"), but the House deleted that provision and the Senate later acquiesced to the House version. *See* Patent Misuse Reform Act, PL 100-703 (1988) (containing no such provision).

In the following decade, Congress had five more opportunities to overturn the market power presumption in antitrust cases. It never, however, enacted such legislation, despite its keen awareness of the court cases applying the market power presumption, as well as the lobby to eliminate it.[14] Congress is perfectly capable of amending antitrust laws in response to judicial decisions, as evidenced by its response to *A.B. Dick* in the Clayton Act, *see supra* pp. 12-13, 16-17. Its repeated refusal to eliminate the market power presumption in antitrust cases should not be second-guessed here.

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[14] *See* H.R. 401, 105th Congress (1997) (proposing the "Intellectual Property Antitrust Protection Act of 1997," which provided that "[i]n any action in which the conduct of an owner, licensor, licensee, or other holder of an intellectual property right is alleged to be in violation of the antitrust laws in connection with the marketing or distribution of a product or service protected by such a right, such right shall not be presumed to define a market, to establish market power (including economic power and product uniqueness or distinctiveness), or to establish monopoly power"); H.R. 2674, 104th Congress (1995) (proposing the "Intellectual Property Antitrust Protection Act of 1995," prohibiting same); S. 298, 101st Congress (1990) (proposing the "Intellectual Property Antitrust Protection Act of 1990," prohibiting same and providing that an intellectual property right may be found to define a market or establish market power "upon a showing by a preponderance of the evidence that a product, process, or service substantially equivalent to or substitutable for the product, process, or service protected by that right is not available"); S. 270, 101st Congress (1989) (proposing the "Intellectual Property Antitrust Protection Act of 1989," prohibiting same); H.R. 469, 101st Congress (1989) (proposing the "Intellectual Property Antitrust Protection Act of 1989," prohibiting same).

Even if this Court did consider Trident's purely policy-based attacks on the market-based presumption, they are substantively baseless and therefore cannot justify rejection of a rule that this Court has endorsed for more than half a century.

A. Tying Law Protects Innovation, Competition, and Consumer Welfare Through Affirmative Defenses and Elements Other Than Market Power

Trident asserts that the patent tying presumption will deter innovation, encourage meritless litigation, and penalize pro-competitive conduct. Pet. Br. at 27-34. If the presumption caused all these bad consequences, Trident should easily be able to offer numerous concrete examples from the past fifty years. It does not. Instead, Trident offers sheer speculation.

Trident asserts that the presumption of market power increases the costs of owning and enforcing intellectual property, and it therefore discourages firms from investing in the development of intellectual property in the first place. Pet. Br. at 33-34. That is empirically untrue. The number of patents has been increasing. *See, e.g.*, NAT'L RESEARCH COUNCIL OF THE NAT'L ACADEMIES, A PATENT SYSTEM FOR THE 21ST CENTURY 28 (2004). Trident does not explain how an inventor would anticipate that the innovation on which he is working would eventually be used in a tying arrangement and subject to tying litigation, much less why the prospect of the use of a presumption of market power in that case would affect his decision to pursue the invention. Patents are already subject to expensive infringement and invalidity litigation in which discovery alone can easily cost hundreds of thousands of dollars, and trials routinely cost millions of dollars to conduct. *See id.* at 68-70. There is no reason to believe that an inventor undeterred by potential infringement

litigation would be so concerned about the possibility of tying litigation that he would abandon his inventive efforts.

Trident also asserts that the patent tying presumption increases the chances that "deficient claims" will survive to trial and therefore "increases the odds that unjustified settlement payments will be extracted." Pet. Br. at 33. Here again, Trident has not raised a realistic concern. As noted above, market power is not the only element of the "*per se*" rule against tying. *See supra* p. 20. The rule also requires proof of additional elements such as whether separate products are involved, consumers have been coerced into accepting the tying arrangement, and a substantial amount of commerce has been affected. *See* ANTITRUST LAW DEVELOPMENTS 5TH, *supra*, at 179; *see also id.* at 175, 179 (noting that some courts require an economic interest in the tying product and other courts require an anticompetitive effect in the tied product market). In addition, tying defendants can invoke the antitrust injury doctrine, *see id.* at 839-49, or affirmative defenses based upon efficiency and other business justifications. *See id.* at 207-08. There is therefore no reason to believe that liability for tying claims will be imposed simply because market power is presumed. The presumption of market power is merely one element of a tying plaintiff's claim and does not guarantee the plaintiff will prevail.

Trident's claim that the patent tying presumption creates the "danger that procompetitive tying arrangements will be penalized" (Pet. Br. at 31) also ignores tying law. It is true that the market power requirement can screen out harmless ties that may be procompetitive. *See, e.g., Grappone*, 858 F.2d at 797-97. Market power is not, however, the only screen imposed by the many elements and defenses in tying law. For example, most of the procompetitive benefits of tying result from bundling products together to take advan-

tage of economies of scale or economies of distribution.[15] These practices are protected primarily by the requirement that the products allegedly tied together be economically separate, which "is critical for separating procompetitive bundling practices from [illegal] ties." Sullivan & Grimes, *supra*, § 7.2d.1, at 414. In addition, because bundling lowers prices, such practices are also protected by the coercion requirement, *see Jefferson Parish*, 466 U.S. at 12-13, because consumers presumably will buy lower priced goods voluntarily.

The patent tying presumption also does not prevent defendants from invoking affirmative defenses and similar protections. For example, Trident observes that tying can be used to facilitate entry into markets. This Court has recognized that the need to enter a developing market may justify a tying arrangement, at least for a temporary period of time. *See Jerrold Elecs. Corp. v. United States*, 365 U.S. 567 (1961), *aff'g per curiam*, 187 F. Supp. 545 (E.D. Pa. 1960). Trident also observes that tying arrangements can be used to achieve "efficient technological interdependence." Pet. Br. at 28 (quotation omitted). Such business justifications can be invoked as affirmative defenses and sometimes may even justify an exclusion from the *per se* rule. *See, e.g., Microsoft*, 253 F.3d at 89-95.

Finally, Trident claims that, by measuring the use made of the tying product, tying arrangements bring a host of benefits such as protecting quality, preserving goodwill, helping to calculate license fees, and spreading the risks of new

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[15] *See, e.g.*, Pet. Br. at 27 (noting that tying arrangements may "lower[] costs or increas[e] value") (quotation omitted); *id.* at 28 (make provision of goods "more efficient," "achieve economies of scale," and achieve "cost savings") (quotations omitted); *id.* at 29 n.7 ("distribution cost savings") (quotation omitted); *see also id.* (noting "compatibility cost savings") (quotation omitted).

technologies.[16] As just demonstrated, there is little danger of "false positives" with such claims. Although defendants frequently argue that tying arrangements are needed to ensure quality and protect reputation, in practice such claims usually turn out to be pretextual because there are other ways such as product specifications to protect these interests without forcing buyers to accept an unwanted product. *See supra* p. 28.[17] Similarly, tying arrangements are not needed to measure usage or to spread the risk of new technology in many cases because companies can directly meter usage using digital technologies. *See supra* pp. 27-28. Here again, Trident's concerns about the effects of the presumption do not withstand analysis.

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[16] *See, e.g.*, Pet. Br. at 27 ("protecting quality") (quotation omitted); *id.* at 28 ("promoting product quality and protecting supplier's goodwill") (quotation omitted); *id.* at 29 n.7 (protecting "quality of the variable input") (quotation omitted).

[17] Trident's assertions about the need to protect the performance of its printers are no exception. Trident contends that there is "compelling" evidence in the record that use of third party inks can jeopardize the performance of its printheads. Pet. Br. at 30 n.8. In fact, the only evidence that Trident cites is its own licensing policy, J.A. 378a-79a, and marketing materials. J.A. 457a, 459a-70a. Even more important, the record shows that the ink produced by Independent Ink is "basically identical" to Trident's ink, J.A. 519a, that Trident had no evidence that Independent Ink's product has damaged any Trident printheads, J.A. 482a, and that Trident did not object to the use of third party inks until those inks encroached upon Trident's sales. J.A. 478a. Moreover, these objections were raised as part of an overall marketing plan. *Id.* It is also worth noting that Trident fails to reconcile its supposed concern for the quality of inks used in its printheads with its representation to this Court that it permitted end users to buy any inks they pleased. *See* Pet. Br. at 4; *see also supra* p. 4 n.1 (noting that the evidence in the record contradicts this assertion). If end users were permitted to buy any ink they please, Trident's purchase restrictions would not be able to control the quality of the ink being used by end users.

B. Neither the Patent Misuse Reform Act Nor the DOJ Enforcement Guidelines Undermines the Patent Tying Presumption

The Patent Misuse Reform Act. Trident asserts that it is "possible" that "some members of Congress" believed that the Patent Misuse Reform Act of 1988 eliminated the market power presumption in antitrust tying cases. Pet. Br. at 41 n.15; *see also* Gov't Br. at 14-15, 22. Speculation about the unexpressed beliefs of members of Congress has no bearing on statutory interpretation. Congress acts collectively through enacting laws that are presented to the President: the unexpressed beliefs of individual lawmakers are therefore irrelevant. *See, e.g., Regan v. Wald*, 468 U.S. 222, 237 (1984); *see also Bank One Chicago, N.A. v. Midwest Bank & Trust Co.*, 516 U.S. 264, 279 (1996) (Scalia, J., concurring) ("The law *is* what the law *says*, and we should content ourselves with reading it rather than psychoanalyzing those who enacted it."). Here, Congress has not acted to overturn the presumption.

In any event, as the Federal Circuit recognized, Pet. App. 10a n.7, to the extent that any inference can be drawn from the legislative history of the Patent Misuse Reform Act, it favors this Court's maintenance of the presumption of market power. As previously observed, *see supra* pp. 34-35, when the Senate passed its version of the Act, the bill addressed the presumption of market power in tying cases. *See* Pet. App. 10a n.7. The House, however, deleted these provisions, and the Senate acquiesced to the House version, making it "clear that Congress was not attempting to change existing law" with respect to the market power presumption in patent tying cases. *Id.*

Nor is it surprising that Congress would change the patent misuse doctrine without similarly changing antitrust law. Congress intended the Patent Misuse Reform Act to divorce the patent misuse defense from antitrust law and return the

defense to its equitable roots. *See, e.g.*, 134 Cong. Rec. S17146-02 (Oct. 21, 1988) (statement of Sen. Leahy) (noting that the Act "plainly restored" the "equitable nature of the misuse doctrine"); 134 Cong. Rec. H10646-02 (Oct. 20, 1988) (statement of Rep. Kastenmeier) (same). In other words, as the Federal Circuit recently observed, the Act "makes clear that the defense of patent misuse differs from traditional antitrust law principles." *U.S. Philips Corp. v. I.T.C.*, No. 04-1361, 2005 WL 2293081, at *5 (Fed. Cir. Sept. 21, 2005); *accord* Pet. Br. at 17-18. In addition, the equitable defense of patent misuse, unlike tying law, does not contain a requirement such as forcing that protects pro-competitive conduct. *See supra* p. 20. It made perfect sense for Congress therefore to require proof of market power and create a "safe harbor" against charges of patent misuse. *See U.S. Philips*, 2005 WL 2293081, at *5.

The DOJ Enforcement Guidelines. Trident observes that under guidelines issued in 1995 federal antitrust enforcement agencies do not presume that patents or any other intellectual property rights confer market power. *See* Pet. Br. at 35-37. Obviously, those guidelines cannot overrule the decisions of this Court or require it to adopt positions in conflict with the congressional policies underlying the prohibition against tying in Section 3 of the Clayton Act. In any event, the guidelines shed little light on the patent tying presumption. They address all antitrust claims dealing with intellectual property, not just patent tying claims. Moreover, they deal with the Government's "antitrust *enforcement* policy" and decisions to prosecute and investigate, not the order of proof during civil litigation. Gov't Br. at 1; *see* UNITED STATES DEP'T OF JUSTICE AND FEDERAL TRADE COMM'N, ANTITRUST GUIDELINES FOR THE LICENSING OF INTELLECTUAL PROPERTY § 1 (1995) (emphasis added). Thus, Trident's reliance upon the guidelines is misplaced.

C. Current Scholarly Opinion Supports the View That Requirements Ties Pose Serious Anti-competitive Dangers

Trident asserts that the patent tying presumption of market power has been rejected by the "unanimous modern view of economists and legal scholars." Pet. Br. at 11. In fact, the legal scholars cited by Trident object to the presumption that patents in general confer market power; they do not consider whether patents actually used in tying arrangements are likely to confer market power. Moreover, Trident is simply wrong in arguing that such scholars unanimously condemn the patent tying presumption. *See* Nalebuff *et al.* Br. at 1-2, 4 (Professors Ian Ayres and Lawrence Sullivan endorsing presumption).

Trident is also wrong in arguing that economists oppose the presumption. Although leading economists reject the presumption that *all* patents confer market power, they support the presumption that those patents used to impose tying arrangements confer market power. *See* Scherer Br. at 9-10, 18 (noting that patents involved in litigation are likely to be unusually valuable patents); Nalebuff *et al.* Br. at 22-27 (noting that patents in requirements ties are likely to confer market power).

In addition to incorrectly claiming unanimous academic support for its position, Trident asserts that most tying arrangements are economically beneficial and that the patent tying presumption therefore creates an unacceptable risk of "false positives." Pet. Br. at 27 (quotation omitted). The Clayton Act, however, forecloses any assumption that tying is an essentially benign practice. Section 3 of the Act contains a specific prohibition—a rarity in antitrust law—against tying and similar exclusionary practices, which expresses Congress' "great concern about the anticompetitive character of tying arrangements." *Jefferson Parish*, 466 U.S. at 10. This congressional policy "must be respected." *Id.*

Contrary to the impression that Trident seeks to create, the dangers of tying perceived by Congress are well-recognized by economists. To be sure, according to a view prevalent in the last several decades, tying cannot be used to leverage power from one market into another and therefore should be treated as presumptively procompetitive. *See, e.g.*, Robert Bork, THE ANTITRUST PARADOX (2d ed. 1993); Ward S. Bowman, Jr., PATENT AND ANTITRUST LAW (1973). More recent economic scholarship, however, recognizes that this once prevalent view adopts a static perspective that unrealistically assumes perfect competition in the tied product market and fails to take into account possible effects of innovation. *See, e.g.*, Kaplow, *supra*, at 526-39; Nalebuff, *Bundling, Tying, and Portfolio Effects*, *supra*, at 20-27. Under more realistic assumptions taking into account technological innovation and the possibility of change, tying can be used to alter market structure to prevent the entry of competitors in the tied product market, or to force competitors out of the market.[18]

In addition, the tying arrangement at issue here—a requirements tie—poses a different and especially pernicious sort of danger: it reduces consumer welfare. Requirements ties are a form of metering, which is frequently used to facilitate price discrimination. *See supra* pp. 26-27. As leading economists observe, price discrimination by means of metering is imper-

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[18] *See* Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 RAND J. ECON. 194 (2002) (finding that tying can help to preserve and extend monopolies by denying competitors needed economies of scale); Jay Pil Choi & Chris Stefanadis, *Tying, Investment, and the Dynamic Leverage Theory*, 32 RAND J. ECON. 52 (2001) (finding that tying deters entry by reducing the incentive of entrants to engage in research and development); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 AM. ECON. REV. 837 (1990) (recognizing that tying arrangements can be used to force the exit of competitors in the tied product market). *See generally* Nalebuff, *Bundling, Tying, and Portfolio Effects*, *supra*, at 39-62.

fect and may create allocation inefficiencies, *see* Nalebuff *et al.* Br. at 20-21; it distorts the behavior of consumers and sellers alike in wasteful ways, *id.* at 21-22; and it transfers the surplus normally enjoyed by consumers to sellers, thereby reducing consumer welfare. *Id.* at 19; Carlton & Perloff, *supra*, at 306-07.

Requirements ties also can be used to deceive consumers. As this Court has recognized, even sophisticated businesses often have difficulty calculating the aftermarket costs of a product. *See Kodak*, 504 U.S. at 473-76. Requirements that aftermarket supplies be purchased from a manufacturer can therefore be used to shroud supracompetitive prices and deceive consumers into paying more than they would in a competitive market. *See* Sullivan & Grimes, *supra*, § 7.2c3i, at 406; Nalebuff *et al.* Br., at 25-26. Indeed, because more direct means of metering are often available—here, for example, Trident could easily have directly metered usage by charging its customers and end users a fee per carton regardless of the ink used—the desire to shroud prices, and thereby enhance market power, frequently is the most plausible explanation for a requirements tie. *See id.* at 26.

Finally, the threat of false positives is empirically low. The patent tying presumption has been recognized for more than fifty years, yet neither Trident nor its many *amici* point to any concrete examples of false positives, much less the plethora that Trident's argument suggests. *See supra* pp. 37-38. Moreover, sellers are free to pursue the supposedly procompetitive benefits of requirements ties through less coercive means. *See supra* pp. 27-28; *id.* at p. 28 (noting that risk sharing and price discrimination can be accomplished through direct metering) (noting that quality can be ensured through product specifications). Nor does the patent tying presumption extend antitrust law into a new and complex area where courts cannot reliably assess the reasonableness of the conduct. *Cf. Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko,*

LLP, 540 U.S. 398 (2004) (rejecting antitrust claim against telecommunication industry defendant subject to extensive government regulation). To the contrary, it deals with a practice, tying, that the courts have been considering since the early days of the Sherman Act.

IV. THE JUDGMENT BELOW SHOULD BE AFFIRMED BECAUSE, EVEN WITHOUT A PRESUMPTION, MARKET POWER WAS DEMONSTRATED ON THE RECORD BELOW

Even if the Court should decide to limit or overturn the patent tying presumption, the decision below reversing summary judgment for Trident should be affirmed on the ground that the direct evidence in the record is sufficient to show market power. As Trident has long recognized, it "dominates the inkjet printhead market." J.A. 260a. It has licensed its printhead technology to OEMs making over 95% of ink jet printers for carton coding applications. In addition, under its own market definition, from at least 1994 to 1998, Trident printheads accounted for the printheads in *all* of the printers sold for this purpose and Trident continued to account for more than 80% of the sales after that. J.A. 18a, 20a, 333a, 373a.

Although market power is most frequently proven indirectly through market share analysis, such analysis is not needed to prove market power. Market power can also be shown through direct evidence of its exercise. *Kodak*, 504 U.S. at 469 (finding market power proven through evidence of "increased prices and excluded competition"); *F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460-61 (1986) (broad, sustained refusal to deal); *Toys 'R' Us, Inc. v. F.T.C.*, 221 F.3d 928, 937 (7th Cir. 2000) (reduction in output); *RE/MAX Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1018-19 (6th Cir. 1999) (exclusion of competition). In the tying context, a party must have sufficient power over the tying product "to

raise prices or to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market." *Fortner II*, 428 U.S. at 620; *see also Jefferson Parish*, 466 U.S. at 13 (requiring power to "force a purchaser to do something that he would not do in a competitive market"). Thus, market power in a tying case can be proved by direct evidence that a party has raised prices or imposed, over a sustained period, unwanted and burdensome terms upon consumers.

In this case, there was direct evidence of Trident's market power. Trident charged nearly three times more than Independent Ink and other competitors for replacement ink, *see supra* p. 5, something it plainly could not have done absent power in the market for its patented printheads. In addition, Trident was able to force consumers to accept unwanted aftermarket purchase requirements. Trident's own survey found widespread dissatisfaction with its licensing policy. J.A. 388a-410a. Trident's customers objected that the policy was "too restrictive," J.A. 399a, and that Trident's prices for replacement ink were excessive.[19] *See supra* pp. 4-5. Trident's customers also wished for competition and the ability to use other inks. *See* J.A. 393a ("I want to use other inks"); J.A. 394a ("Customers hoping for competition."). Nonetheless, Trident was able to force its customers to purchase ink from it for years—*without* losing market share (*see* J.A. 26a (noting continued expansion of sales))—because its customers thought that there were "no alternatives" and they were "at [the] mercy" of Trident. J.A. 396a, 409a.

Trident's sustained ability to force of consumers to accept unwanted conditions clearly evidences market power. As the

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[19] *See, e.g.*, J.A. 391a ("pricing . . . still considered high for heads . . . excessive for inks"); J.A. 394a (pricing on "heads too excessive, also inks"); J.A. 397a ("highly priced hardware and ink"); J.A. 400a ("prices on heads and inks are too excessive").

First Circuit has observed, "[i]f the seller does not have market power with respect to product A, it cannot force buyers to take a more expensive or less desirable Product B, for if the Seller tries to do so, buyers will simply turn elsewhere for Product A." *Grappone*, 858 F.2d at 795.

Here, Trident required consumers to accept a condition that most dislike and that forces them to pay prices that they correctly perceive as excessive. Nevertheless, it has been able to continue these practices for years. This evidence that Trident has forced consumers to accept an unwanted condition and pay excessive prices is more than sufficient to demonstrate market power. *See Jefferson Parish*, 466 U.S. at 12 (noting that "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms").

The direct evidence of market power in this case is buttressed by more general considerations as well. First, the tying arrangement was based upon patents, which, as shown above, suggests that the patents are highly valuable and therefore confer market power. *See supra* pp. 23-26, 29-30. Second, the tying arrangement was a requirements tie, which generally does not offer any cost savings or other advantages to consumers, and Trident's claim that it imposed the tie to ensure quality is undermined by evidence that the parties' respective inks are functionally indistinguishable. *See supra* pp. 26-28. Third, Trident engaged in sustained price discrimination, which by itself is widely recognized as evidence of market power. *See supra* p. 28

Combined with the direct evidence of market power provided by Trident's customer survey, these considerations are more than adequate to show that Trident had sufficient market power to force buyers into purchasing its ink. As a consequence, no matter how the question presented concern-

ing the patent tying presumption is resolved, the judgment below reinstating Independent Ink's patent tying claims was correct and should be affirmed.

CONCLUSION

For the reasons stated above, the decision below should be affirmed.

Respectfully submitted,

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